

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Digital Audio Broadcasting Systems)	MM Docket No. 99-325
And Their Impact on the Terrestrial)	
Radio Broadcast Service.)	
)	

To: The Commission

COMMENTS OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION

TABLE OF CONTENTS

I. Introduction.....	3
II. Discussion.....	5
A. <i>Copyright Protection for Music over Digital Audio Broadcast is as Imperative as Copyright Protection for Digital Television.</i>	5
B. <i>Lack of Copy Protection Will Induce Owners of Copyrighted Works to Withhold Content From Digital Audio Broadcast, thus Impeding A Successful Conversion of Analog Radio Service to Digital.</i>	7
C. <i>High Quality Digital Radio Recorders with Metatag Capability Must Have Usage Rules.</i>	9
D. <i>The Proposed Regulatory Rules Do Not Address "Advanced Multimedia" Services Offered by DAB.</i>	11
III. Conclusion	12

COMMENTS OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION

The National Music Publishers' Association ("NMPA") hereby submits these comments in connection with the Commission's Further Notice of Proposed Rulemaking and Notice of Inquiry ("FNPRM"), FCC 04-99 (Adopted: April 15, 2004; Released April 20, 2004) in the above-captioned proceeding. NMPA strongly objects to the launching of this new digital music service without adequate copy protection for the underlying musical works, for the reasons that follow.

I. Introduction

NMPA works to protect and advance the interests of the music publishing industry. With more than 800 members, NMPA represents the leading companies in the industry, from those affiliated with large media companies to the industry's largest and most influential independent music publishers. The Harry Fox Agency, NMPA's licensing affiliate, provides an information source, clearinghouse, and monitoring service for licensing musical work copyrights and acts as licensing agent for more than 27,000 music publisher-principals, who in turn represent more than 160,000 songwriters. The instant proceeding is of interest to NMPA primarily because of its impact on the reproduction and distribution of digital copies of music, including the use of the Internet to further redistribute such copies.¹

Digital audio broadcast radio (DAB) offers the potential of tremendous improvement in audio fidelity over analog radio. NMPA welcomes the fact that music lovers around the country will be able to enjoy listening to their favorite songwriters and artists with digital

¹ The exclusive rights of music copyright owners to reproduce and distribute their works are found at 17 U.S.C. 106(1) and 106(3). These rights are in addition to the right of such owners to publicly perform these works, which is found at 17 U.S.C. 106(4) and which is typically administered by "performing rights organizations" such as ASCAP and BMI.

clarity. The Commission makes note in the FNPRM of the "dramatic improvement in digital audio quality" that is "near-CD quality."²

The distribution of high-quality digital audio free and clear of any copyright protection mechanism with readily accessible metadata³ attached, however, will facilitate additional piracy of music and impose significant economic damage on artists and songwriters. The destruction of the livelihood of songwriters and music publishers by means of a government mandated give-away of their artistic product would be a great tragedy and should be avoided at all costs. This problem must be addressed now, before the new technology becomes established. The music industry is already suffering significantly from unlawful peer-to-peer file sharing. DAB would compound the industry's current problems many times over. In addition to imposing significant injuries on artists, the result to the consumer will be that much less new musical content will be released into the market.

The fundamental concern of the NMPA is twofold: (i) without an appropriate copyright protection mechanism, DAB as currently proposed will become a new source of illicit digital copies of copyrighted works, and (ii) the recording functionality that emerging hard drive-based devices provide raises the likelihood that widespread automated recording of digital broadcasts indexed by accompanying digital metatags will replace the distribution and sale of legitimate copies of recorded music. If the FCC fails to incorporate necessary protections into its DAB rules, it will destroy the economic incentives for songwriters to write songs, for artists to record such songs, and to have these songs broadcast over this new medium. That the Commission's current rules are silent on this issue directly impairs the interests of songwriters

² FNPRM at ¶ 2.

³ Metadata means text data identifying the recording, artist, song, etc., which can be read from the digital signal as each broadcast of a recording commences.

and music publishers alike. As such, NMPA strongly opposes the present effort to launch digital audio broadcast radio programming.

II. Discussion

A. Copyright Protection for Music Delivered over Digital Audio Broadcast is as Imperative as Copyright Protection for Digital Television Programming.

The Commission is familiar with the problem that free, over-the-air digital broadcast of valuable copyrighted content introduces the threat of digital piracy. The Commission has already acknowledged the threat of digital piracy from digitally broadcast content in the *Further Notice of Proposed Rulemaking* in the Cable Plug & Play proceeding.⁴ Similarly, in the *Broadcast Flag Report and Order*,⁵ the Commission determined that:

we anticipate that the potential for piracy [of digital television content] will increase as technology advances. As demonstrated by the presence today of analog broadcast content on peer-to-peer file sharing networks, we believe that content owners are justifiably concerned about protecting all DTV broadcast content. ... We conclude that by taking preventative action today, we can forestall the development of a problem in the future similar to that currently being experienced by the music industry.⁶

The same problem lurks in the field of digital broadcast radio. The broadcast of digital quality audio recordings that can be automatically captured, recorded and redistributed over the Internet will completely defeat the success that the music industry has had in fostering

⁴ *In re Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, (“Cable Plug & Play Proceeding”), Further Notice of Proposed Rulemaking, CS Docket No. 97-80, PP Docket No. 00-67, FCC 03-3 (2003).

⁵ *In re Digital Broadcast Content Protection*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 02-230, FCC 03-273, (2003) (“*Broadcast Flag Report and Order*”).

⁶ See *Broadcast Flag Report and Order* at ¶ 8.

legitimate digital music distribution services by developing digital copy protection mechanisms.⁷ The Commission's prior rulemakings requiring a broad range of television related consumer appliances to be capable of receiving and decoding DTV broadcast content,⁸ make it clear that, for similar reasons adequate copyright protection technology must also be present in any devices designed to directly or indirectly receive DAB broadcast signal, in order to avoid a new source of illicitly redistributed copyrighted material.

The requirement for copy protection is not impractical. Public statements by iBiquity itself indicates that the iBiquity standard will enable broadcasters and others to control the duplication and redistribution of certain programs or program genres.⁹ And the same statements indicate that it is "sufficiently early in the game" so as not to involve a legacy market problem.¹⁰ On the other hand, a lack of copy protection for DAB would produce the arbitrary and incongruous result that while the Commission justifies its mandate for protection of audio-visual works¹¹ in the field of DTV by relying on the factual experience of the music industry,¹² it would mandate a technology for digital broadcast radio (DAB) that provides for

⁷ The Commission has acknowledged that the illicit redistribution of digital music over the Internet is a substantial problem. *Id.*

⁸ *In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, MM Docket No. 00-39, Second Report and Order and Second Memorandum Opinion and Order. (Adopted: August 8, 2002, Released: August 9, 2002).

⁹ See statement of iBiquity CEO Robert Struble, *Communications Daily*, April 19, 2004, pg. 5. See also iBiquity's Doc. No. SY_AAS_5035 pg. 6, where "conditional access" capability is described. Conditional Access is dependent on some form of copy protection.

¹⁰ *Id.* The statement that iBiquity cannot determine what the copy protection perimeter would be does not render the point moot: the Commission itself launched the Broadcast Flag proceeding in order to resolve the same debate in the context of DTV.

¹¹ *In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, MM Docket No. 00-39, Second Report And Order And Second Memorandum Opinion And Order. (Adopted: August 8, 2002, Released: August 9, 2002).

¹² Note 6, *supra*.

free distribution of unprotected CD-quality recordings.¹³ The Commission should not end up with two opposite outcomes based on the same factual record. Therefore, NMPA urges that the Commission to require that all DAB transmitting and receiving equipment contain an appropriate copy protection regime.

B. Lack of Copy Protection Will Induce Owners of Copyrighted Works to Withhold Content from Digital Audio Broadcast, thus Impeding A Successful Conversion of Analog Radio Service to Digital.

The Commission has requested further comment on the pace of conversion to an all-digital radio service and what kinds of rules associated with the operation of such a service would encourage conversion of radio stations from analog formats to digital.¹⁴ NMPA believes that proper copyright protection of works broadcast over DAB is essential to the rapid conversion of radio from analog to digital. The success of a new, free, over-the-air digital audio broadcast format requires the availability of popular content. As evidenced by the Broadcast Flag proceedings referenced above, the lack of high-definition digital audiovisual content has impeded the adoption of the technology -- so much so that the Commission itself launched proceedings to address the copy protection problem for television programming.¹⁵

The Commission must take notice, with respect to DAB, that Section 106 of the Copyright Act vests in songwriters and their licensees the exclusive right to publicly perform a song.¹⁶ For this reason, when a recording is broadcast on radio, a license to broadcast the copyrighted work is required even though no license is required for broadcasting the sound

¹³ We note that there is debate whether HD Radio audio quality is equal to CD quality, or is "near-CD quality". However in either case, it is superior in quality to the popular MP3 format, the format used by pirate peer-to-peer music services.

¹⁴ FNPRM at ¶¶ 15-17.

¹⁵ Note 6, *supra*.

¹⁶ 17 U.S.C. 106(4) states that "...the owner of copyright under this title has the exclusive rights to do and authorize ... (1) to reproduce the copyright work in copies or phonorecords (4) in the case of ... musical ... works, to perform the copyrighted work publicly; . . ."

recording in which the copyrighted work is embodied. At present, radio is both a means of entertainment and a means of promotion, and therefore newly released recordings are offered for radio broadcast in part in order to generate demand for the sale of copies. But the change of radio broadcast from solely a public performance that promotes sales of copies into a mechanism that also enables free distribution of digital copies that compete with such sales will have a profound effect on the role radio programming currently has in the music industry: rather than being a top choice for promotion of new recordings, the release of new songs for performance over radio may be withheld until the effect of such digital distribution has a minor effect on the sale of copies.¹⁷ The economics that would drive this shift are simple: those copyright owners who make more money from the sale of copies of their work than from its public performance on the radio would choose to forgo public performance royalties rather than income from sale of copies. And in the reverse case, they would forgo income from the sales of copies in order to retain the public performance royalties. In either case, the copyright owner has lost significant income as a result.¹⁸ It is simply unfair to artists and songwriters that conversion to DAB would force them to forgo one income stream or the other, when the current radio and music industry economy has assumed that the artist and songwriter would earn both income streams. In order to preserve as much of both income streams as possible, many artists and songwriters would confront a new economic incentive: to delay the release of copyrighted works for public performance. As a result, there could be a shift of free over-the-air broadcast from being at the top of the release schedule to the bottom -- thereby impeding the conversion of radio from analog to digital. Those stations whose income is dependent on contemporary hit radio formats for attracting advertising revenue could be faced with a stark

¹⁷ The movie industry already adheres to this theory: movie studios generally do not permit free over-the-air broadcast of their movies until well after all other avenues of remuneration have been exhausted.

¹⁸ At present, an artist gets both streams of income. Therefore, the fact that such an artist would have to make this choice is inherently damaging.

choice: either remain analog and continue in business, or convert to digital and lose the content that attracts listeners.

In sum, NMPA believes that the Commission should adopt final rules for the operation of DAB that require the protection of the copyrights that are broadcast over the DAB station: such rules should encompass the transmission process as well as the design of DAB receivers sold.

C. *High Quality Digital Radio Recorders with Metatag-Based Harvesting Capability Must Have Usage Rules.*

NMPA is concerned about recording functionality that will use metadata to provide automatic "harvesting" of recordings from the radio with no time and effort required on the part of the listener. The notion of using metadata to automatically harvest recordings from free, over-the-air radio has already been introduced into the market.¹⁹ This functionality is also provided in the form of computer software for recording Internet "radio" type streaming broadcasts.²⁰ The combination of free distribution through DAB of high quality digital music with the accompanying metadata that can be automatically read threatens to displace the sale of legitimate copies of the same music, including sales of devices that provide access to these legitimate copies. Instead of purchasing high quality digital music from Internet-based services like Apple's i-Tunes service, a consumer would simply purchase a DAB recording device and instruct it to selectively record by artist or by song. Whereas today a consumer can amass a digital collection of 1000 songs for the price of an Apple i-Pod, which costs \$370 (for the

¹⁹ http://www.gotuit.com/audio/patents/desc_sc.html ("Gotuit's SongCatcher Patent describes the unique technology behind Gotuit's SongCatcher product—a technology which allows you to record an FM/AM radio broadcast and subsequently download metadata to identify and separate out specific songs from the stored audio stream.") See also comments regarding "automatic recording" of Sylvie Scokar, Harris Broadcast Europe, at <http://www.broadcastpapers.com/radio/HarrisDABKillerApp%20-%20print.htm>.

²⁰ Applian Technologies offers software called "Replay" that "Captures streaming music into high quality MP3 files, and burns audio CDs too. Splits recordings precisely and accurately into separate tracks. Automatically tags songs with artist and track information. " <http://www.replay-music.com/index.php>

device) and \$999 for the songs, users of DAB harvesting recorders will be able to purchase a recording device for about \$250 and simply allow the equipment to complete its automated selection and recording task.²¹ Royalties for the copyrighted work would only be paid as a result of sales by Apple i-Tunes. As a result, the economic value of legitimate copies would be destroyed. With fewer legitimate copies sold, artists and songwriters would receive substantially less royalties. NMPA is concerned that the proven demand for free copies of high quality digital copyrighted works will spur demand for these devices.

The availability of this technology also changes the nature of broadcast radio's position in the music industry. This class of functionality changes DAB from a means of public performance into one that can also distribute copies: a manner of copyright exploitation that is beyond the purview of the public performance right held by radio stations and networks and in competition with legitimate distributors of copies of the copyrighted works.²² Without any regulatory control, DAB will become a government mandated service that provides high quality digital copies of content, with drastically reduced remuneration to the artists and songwriters. The only recordings that would not be subject to this threat would be those that are generally not programmed on the radio: less popular, obscure or narrowly popular genres. As explained in Section III.B. above, this result would be a strong inducement for songwriters and artists to not release any new songs for broadcast over DAB until late in the promotional cycle, if at all.

The only solution to this problem is to introduce limitations in how devices that record DAB can respond to and use the metadata that accompanies the broadcast. What the appropriate so-called "usage rules" for metadata should be is a matter for further consideration.

²¹ This is the price of The Bug, a DAB recorder, although at this time it is not known to have metadata harvest capabilities. <http://www.simplyradios.net/>

²² 17 U.S.C. § 106. The acts of "publicly perform" and "distribution" are distinct copyright rights that, in the case of copyrighted works, are separately licensed.

But the fact that such rules should be determined is essential before devices are released in the field that later are considered the "consumer expectation" that must be met.²³ Therefore, NMPA believes that the Commission's rules for DAB must include appropriate limitations on the use of automated recording capabilities that exploit the metadata accompanying the broadcast content.

D. The Proposed Regulatory Rules Do Not Address "Advanced Multimedia" Services Offered by DAB.

The Commission has mandated that the technology to be used for DAB be that provided by iBiquity Digital Corporation.²⁴ In addition, the Commission acknowledges that the technology will include "new data services."²⁵ According to iBiquity's website, DAB also features advanced listener functions beyond the realm of enhanced sound quality. Of particular concern to NMPA is the function described by iBiquity on its website as: "Listener controlled main audio services provide the ability to pause, store, fast-forward, index, and replay audio programming via an integrated program guide with simplified and standard user interface options..."²⁶ Figure 1 on page 4 of one of iBiquity's Technical White Papers, entitled "An Advanced Application Services Framework for Application and Service Developers using HD Radio Technology" illustrates an example of an on-demand HD Radio. Prominently displayed are buttons reminiscent of a standard CD player, featuring play, fast-forward, rewind, record, etc. This same White Paper draws a distinction between "on-demand" music delivery and broadcast. Page 12 of the White Paper defines "personal radio" as the following: "A service

²³ As noted before, it is "early in the game" and the lack of this kind of functionality from existing digital radio services like XM Radio and Sirius means that consumers do not generally expect to be able to do this with their DAB equipment.

²⁴ FNPRM at ¶ 1.

²⁵ FNPRM at ¶ 2.

²⁶ <http://www.ibiquity.com/technology/data.htm>.

delivering on-demand audio-centric multimedia providing a collection of multimedia programming utilizing SMIL...including stock, news, weather and entertainment..." (emphasis added).²⁷

These functionalities will operate much like music subscription services on the Internet. Listeners will be able to subscribe to on-demand music in some manner by making a request that is delivered and recorded on a local device.²⁸ These functionalities, as described above, undercut the sale of copies of recordings from which artists and songwriters also make their living as well as undercut the nascent interactive services that are licensed for Internet distribution. Therefore, NMPA believes that the final rules for the operation of DAB should include a requirement that these advanced multimedia services for DAB not be functional unless the appropriate copyright owners have authorized the fixation of the copy on the consumer's device and that the appropriate copyright protection is enabled.

III. Conclusion

NMPA requests that the Commission adopt rules to protect the copyright interests of songwriters and artists whose works would be broadcast over DAB.

²⁷ http://www.ibiquity.com/technology/documents/SY_TN_5032_000.pdf). SMIL (Synchronized Multimedia Integration Language) is a standardized content description language promulgated by the World Wide Web consortium.

²⁸ Subscription access only works if there is some kind of access control mechanism, thus reinforcing the notion that iBiquity's technology is already capable of sophisticated copyright protection and usage control.

Respectfully submitted,

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